SUPREME COURT, U. S.

No. 1326

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In the

Supreme Court of the United States

OCTOBER TERM 1968

ST. JAMES TEMPLE OF THE A.C.H. CHURCH OF GOD, INC., a Religious Corporation, et al.,

Petitioners,

vs.

BOARD OF APPEALS OF THE CITY OF CHICAGO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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INDEX

	PAGE
Jurisdiction	2
Question Presented	2
Constitutional Provisions	2-3
Statement of Facts	3
Reasons for Granting the Writ	4-10
Conclusion	10
Opinion of the Illinois Appellate Court	1 (a)
Chicago Zoning Ordinances	12 (a)

Table of Cases Cited

Columbus Park Cong. of Jehovah's Witnesses, Inc. v. Board of Appeals, 25 Ill. (2d) 65, 182 N.E. (2d) 722	7
Community Synagogue v. Bates, 1 N.Y. (2d) 445, 136 N.E. (2d) 488	9
In Matter of Diocese of Rochester v. Planning Bd., 1 N.Y. (2d) 849, 136 N.E. 827	7
Martin v. City of Struthers, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313	7
O'Brien v. City of Chicago, 347 Ill. App. 45, 105 N.E. (2d) 917	5
St. James Temple of the A.O.H. Church of God, Inc. v. The Board of Appeals of the City of Chicago, et al., 100 Ill. App. (2d) 302, 241 N.E. (2d) 525	4-5
State ex rel. Synod of Ohio v. Joseph, 139 Ohio 229, 39 N.E. (2d) 515, 138 A.L.R. 1274	7
Westchester Reform Temple v. Brown, 22 N.Y. (2d) 488, 239 N.E. (2d) 891	6

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St. James Temple of the A.O.H. Church of God, Inc., a religious corporation, prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois rendered October 15, 1968, in a 2-to-1 decision, and the order entered by the Supreme Court of Illinois on January 27, 1969, denying the Petition for Leave to Appeal, and the order entered by the Supreme Court of Illinois on March 18, 1969, denying a reconsideration thereof.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is reported in 100 Ill. App. (2d) 302, 241 N.E. (2d) 525 (1968), and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Illinois Appellate Court affirming the judgment of the Circuit Court of Cook County, Illinois and the Zoning Board of Appeals was rendered October 15, 1968. The Petition to the Supreme Court of Illinois for Leave to Appeal was denied on January 27, 1969, and the Petition for Reconsideration was denied on March 19, 1969. The mandate was stayed by order of the Appellate Court on April 7, 1969 (see certified transcript of record).

Jurisdiction of this Court rests on 28 USCA 1257 and 2104, and upon the denial to petitioners of the guarantee of the protection offered by the First and Fourteenth Amendments to the Constitution of the United States.

QUESTION PRESENTED

Whether the Board of Appeals of the City of Chicago under the guise of reasonable regulation in the application of the Chicago Zoning Ordinances unconstitutionally abridged the religious freedom of a small group of 35 Negroes, and denied them the protection offered by the First and Fourteenth Amendments of the United States Constitution.

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

* * *

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.

* * *

Amendment XIV.

Section. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

CONSTITUTION OF ILLINOIS OF 1870.

* * *

ARTICLE II.

Bill of Rights.

* * *

§ 2. No person shall be deprived of life, liberty or property, without due process of law.

§ 3. The free exercise and enjoyment of religious profession and worship, without discrimination, shall be forever guaranteed. . . .

STATEMENT OF FACTS

The petitioner, St. James Temple of the A.O.H. Church of God, Inc., is a religious corporation organized in 1945 under the laws of Illinois and is a member of a national organization. The congregation has an ordained minister. The church previously occupied premises on the south side of Chicago in a business district in an all-Negro neighborhood, under a special use permit issued by the same Zoning Board of Appeals. That property was acquired by Hull House of the Parkway Community Center, and the church was obliged to move. In February 1965, the church purchased the premises at the present location, 856 West 79th Street, Chicago, Illinois, for $20,000.00. On this site was a two-story brick building, located in an area zoned B4-2, for business uses. The Chicago Zoning Ordinance relating to Business Districts is attached hereto as Appendix B.

The petitioner, working within the limits of its budget, sought to establish a church on the site, for its 35 members. The area, however, was one beginning to show the strains of racial transition from Caucasian to Negro. On April 15, 1965, petitioner, while using the premises as a church, filed an application with the Zoning Board of Appeals for a special use permit. A hearing was conducted on June 8, 1965. Strong opposition to a Negro storefront church appeared, including objections from the alderman of the ward. The Board of Appeals denied the application for the special use permit. This ruling was affirmed by the Illinois courts.

REASONS FOR GRANTING THE WRIT

1. The Illinois courts have sanctioned a plan to prevent the establishment of a Negro church in a racially changing neighborhood by construing a Chicago Zoning Ordinance in an unconstitutional manner. The applicable zoning ordinance provides for a church as a special use in a retail business district. The Zoning Board of Appeals has authority to grant a special use permit where a special use is: (1) "necessary for the public convenience at that location"; (2) "is so designed and proposed to be operated that the public health, safety and welfare will be protected"; and (3) the use "will not cause substantial injury to the value of other property in the neighborhood in which it is to be located." *Chicago Zoning Ordinance*, Article 8.4-1, 8.4-4, 11.10-1 and 11.10-5 (Appendix B).

As Presiding Justice Burke said in his dissenting opinion[1]:

> "The litigation herein involves a changing neighborhood. The plaintiff church is a religious organiza-

[1] *St. James Temple of the A.O.H. Church of God, Inc.* v. *The Board of Appeals of the City of Chicago, et al.*, 100 Ill. App (2d) 302, 241 N.E. (2d) 525, at page 531.

> tion of excellent reputation and has been at this site for more than two years with a resulting salutary effect. It is an asset to the community and no one can say that it has been or is a detriment to the public health, safety and welfare of the community. The judgment should be reversed and the cause remanded with directions commanding the defendants to issue the special use permit allowing the plaintiffs to operate a church."

The petitioner raised the constitutional question in its trial court complaint. The Appellate Court in the majority opinion stated that it was "mindful of the constitutional guarantee of freedom of religion and of the importance of houses of worship to any community," but that it was their opinion "that the congregation failed to establish its right to a special use at the proposed location." (241 N.E. (2d) at p. 530)

The constitutional rights to freedom of religion has always been recognized by our courts as paramount and superior to ordinances which merely embody regulations as part of the local government's police power. This is the first case in Illinois where the courts have ruled against the establishment of a church in a business area or in any area. In *O'Brien* v. *City of Chicago*, 347 Ill. App. 45, 105 N.E. (2d) 917 (1952) the court noted at page 51:

> "There is not a single instance, with the exception of a decision by an intermediate court in California, where the courts have sustained prohibition on the erection of churches in any area. Obviously the courts feel that wherever the souls of men are found, there the house of God belongs."

It would be cruel and unjust to force the members of this congregation, who are unable to bear the financial

burden of relocation, to sell the property and seek to re-establish elsewhere. There is no equal justice in evicting the church from the premises when the zoning ordinance under the B-4 classification would permit the premises to be used as a tavern with live entertainment, a crematory, a casket store, a trade school, taxidermist, or a recreation or community center (see Appendix B).

The real motivation of the Zoning Board against the church appeared to be an attempt to retard the racial change in the neighborhood. By preventing a Negro congregation from establishing a storefront church, the only type of church this congregation could then afford, the congregation's members would be less prone to attempt to relocate in the area closer to their church site. This is racial injustice.

2. The opinion of the Illinois Appellate Court is in conflict with the enlightened view of this Court and courts throughout the United States. The Illinois state court based its decision on the principle that the burden is upon the petitioner in a special use application to show public convenience, public health, safety and welfare. However, this rule is not applicable to churches since there is a presumption that the establishment of a church is for the public convenience and the public health, safety and welfare. In *Westchester Reform Temple* v. *Brown,* 22 N.Y. (2d) 488, 239 N.E. (2d) 891 (1968), it was held that "facilities for religious or educational uses are by their very nature 'clearly in furtherance of the public morals and general welfare'" (p. 894), and "what has occurred here is that the Planning Commission under the guise of reasonable regulation, has unconstitutionally abridged religious freedom" (p. 897). The burden of proof was not upon the church but was on the Board of Appeals to show that the "exclusion of the church was in furtherance of the public health,

safety, morals or the public welfare." *State ex rel. Synod of Ohio* v. *Joseph,* 139 Ohio 229, 39 N.E. (2d) 515, 524, 138 A.L.R. 1274 (1942).

In *Matter of Diocese of Rochester* v. *Planning Bd.*, 1 N.Y. (2d) 849, 136 N.E. (2d) 827 (1956), the court holds that the denial of a variance permit to erect a church is a denial of the constitutional free exercise of religion, citing cases from Arizona, Illinois, Indiana, Nevada, Ohio and Texas.

This Court has said that First Amendment freedoms may not be restricted on the same grounds as other rights; that they rise far above public inconvenience, annoyance or unrest, and other like considerations, which may sustain a regulation of commercial activities. In *Martin* v. *City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 867, 87 L.Ed. 1313 (1943), involving a city ordinance prohibiting door-to-door activity, this Court said it did not apply to the distribution of religious pamphlets by members of the Jehovah Witness church, saying at pages 151 and 152:

> "Freedom of religion has a higher dignity under the Constitution than municipal or personal convenience."

3. It is anomalous that the decision under scrutiny is in head-on conflict, except for the changing neighborhood feature, with *Columbus Park Cong. of Jehovah's Witnesses, Inc.* v. *Board of Appeals*, 25 Ill. (2d) 65, 182 N.E. (2d) 722 (1962). In that case, the Illinois Supreme Court reversed the Board of Appeals in an almost identical factual case, saying at 182 N.E. (2d) at page 725:

> "It has also been strongly doubted since Mr. Justice Stone's famous footnote in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, 58 Sup. Ct. 778, 82 L. Ed. 1234, that legislation regulating first amendment freedoms has the normal presumptions of

validity. See *Thomas* v. *Collins*, 323 U.S. 516, 529-530, 65 Sup. Ct. 315, 87 L. Ed. 430."

At 182 N.E. (2d) at p. 726:

"The arguments advanced by defendants, if followed, would be sufficient to bar all religious worship from the commercial areas of Chicago. Such arbitrary prohibition is not consonant with the constitutional guarantees of freedom of religion, nor do we believe it is consistent with the intent of the ordinance."

The action of the Board of Appeals and the Illinois courts in the case at bar plainly jeopardized First Amendment values, and should be reversed.

4. Petitioner believes that the litigation herein initially began with a situation which involved a changing neighborhood at a time when emotionalism was high. The church has now been on the premises for four years, and now uses the entire building for church purposes. There can be no doubt that the existence of a church in the building in question is far more beneficial than any of the uses normally permitted under the B-4 Ordinance. There was no need under the ordinance for the church to show as the Appellate Court prescribed that the area was "assigned to the congregation for its ministry or that any members of the congregation even lived within the vicinity of the church." An imposition of such a request would add new dimension to church establishment. It is petitioner's contention that the standard for churches should be the same whether the structure is a magnificent cathedral or merely a storefront church. To make a distinction is to discriminate and such discrimination is clearly unconstitutional.

The glaring injustice of this case appears when one realizes that a church could be established in Chicago in

any area zoned for residences. These areas are far more expensive and exclusive than an area zoned for commercial activities. The need for a special use permit gave the Board of Appeals an opportunity to accede to the prevailing mood of the area. It is seriously doubted that any proof, no matter how convincing of public convenience, health, safety or service, would have altered their opinion.

In *Community Synagogue* v. *Bates,* 1 N.Y. (2d) 445, 136 N.E. (2d) 488 (1956), a special use permit for a synagogue was denied both by the Board of Appeals and the Appellate Court. The Court of Appeals reversed in these applicable words at 136 N.E. (2d) at page 496:

> "The men and women who left Scrooby for Leyden and eventually came to Plymouth in order to worship God where they wished and in their own way must have thought they had terminated the interference of public authorities with free and unhandicapped exercise of religion. We think that we should accept the fact that we are the successors of 'We, the people' of the Preamble to the United States Constitution and that a court may not permit a municipal ordinance to be so construed that it would appear in any manner to interfere with the 'free exercise and enjoyment of religious profession and worship.' N.Y. Const., art. I, § 3."

During periods of history, there were many church services in basements and attics. A storefront church is no less proper in these times.

In view of the unconstitutional application of the Chicago Zoning Ordinance, which violates the First and Fourteenth Amendments and resulted from pressure, in 1965, of neighborhood groups to prevent an anticipated change of the racial *status quo* in an area which has subsequently been integrated, petitioner believes that the

decision of the Illinois Court is wrong. The question now revolves around the right of these people to worship in an area where they live and work, in a storefront church which they purchased with hard-earned, personal contributions. A constitutional application of the Chicago Zoning Ordinance, recognizing freedom of religion, would be a meaningful application of equal rights to these people. The injustice of the Illinois court must be remedied.

CONCLUSION

We respectfully pray that the Writ of Certiorari issue.

Respectfully submitted,

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APPENDIX A

OPINION OF THE APPELLATE COURT

MR. JUSTICE MCNAMARA DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order of the trial court affirming the decision of the Board of Appeals of the City of Chicago denying a special use permit for a church at 856 West 79th Street, Chicago. The case originally was appealed directly to the Supreme Court which transferred it to this court. The transfer order of the Supreme Court stated in part: "Although plaintiff claims that there is a question of freedom of religion presented, we find no substantial question of that nature in the record. The case involves only the usual factors present in every zoning case and we have no jurisdiction on direct appeal."

The church appeals, contending (1) that the denial of its application for a special use was arbitrary, capricious and bore no substantial relation to the public health, safety and welfare and (2) that the judgment should be reversed because the order of the Board of Appeals contained insufficient finding of facts.

The plaintiff St. James Temple of the A. O. H. Church of God, Inc. is a religious corporation organized in 1945 under the laws of Illinois and a member of a national organization. The church had been located at 3028 South Michigan Avenue and 3158 South Wentworth Avenue, Chicago. The church then located at 508-10 East 67th Street, Chicago, where it operated under a permit granted by the Board of Appeals. In February, 1965, the church purchased the premises at 856 West 79th Street for $20,000 because the 67th Street property had been acquired by Hull House of the Parkway Community Center.

The property at 856 West 79th Street consists of a two story brick building. The main floor had been a store and is now used as a church, while the upper floor contained living quarters. The property is bounded on the south by 79th Street, on the north by an alley, on the west by Peoria Street and on the east by a store. Leo High School is located across the street from the subject property.

The neighborhood in which the property lies is used for residential and business purposes. The site in question is zoned B4-2. B4-2 is a classification under the Chicago Zoning Ordinance for a Restricted Service District. A Restricted Service District is designed to furnish areas served by Restricted Retail Districts with a wide variety of necessary services not permitted within Restricted Retail District zoning.

Under the ordinance, a church is a permitted use in certain residential districts, R-1 to R-8. However, a church is not a permitted use in either B-2 or B-4 business districts, but is designated as a special use which may be allowed only pursuant to certain variation provisions of Article 11 of the ordinance. (Municipal Code of Chicago 1965, ch. 194A, Chicago Zoning Ordinance).

Article 11 provides in part as follows:

> § 11.10-4 Standards. No special use shall be granted by Zoning Board of Appeals unless the special use:
>
> (1) a. Is necessary for the public convenience at that location;
>
> b. Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected; and
>
> (2) Will not cause substantial injury to the value of other property in the neighborhood in which it is located; and
>
> (4) Such special use shall conform to the applicable regulations of the district in which it is to be located.

Article 8.11-1 (4) of the ordinance requires one off-street parking space for every twelve seats in the church.

On March 16, 1965, while the property already was being used for church services, plaintiff filed an application with the office of the Zoning Administrator of Chicago for a permit to use the premises as a church. The application was denied. On April 15, 1965, plaintiff filed an application with the Zoning Board of Appeals of the City of Chicago for a special use permit pursuant to Section 8.4-4 of the Chicago Zoning Ordinance. The application specified that the property was zoned B4-2, that the owners acquired the property for use as a church, that the congregation was small, respectable and seeking a permanent home, that the special use permit was necessary for the public use and would be designed and operated so as not to interfere with or harm the public health, safety and welfare of the community, that the use did not cause injury to the adjacent property, that the applicants would keep the property in good condition, making it a credit to the neighborhood and that because of the small size of the congregation, there would be adequate off-street parking. Pursuant to the zoning ordinance Art. 11.4-1 and 11.10-2, this application was referred to the Commissioner of City Planning. On May 5, 1965 he recommended that the Board of Appeals deny the application to establish the church as not being compatible with existing uses and structures in the area. He stated that both sides of 79th Street from Peoria to Halsted Streets were business uses, that to the west of the property was Leo High School extending from Peoria to Sangamon Streets with a combination parking lot and play yard on the north side of the street, that the Department of City Planning both from a land use and city planning standpoint was opposed to storefront churches and that no parking provisions were intended. The Board of Appeals served notice of a hearing upon all property owners within the vicinity of the subject property. In response to that notice, written objections were received from individual property owners and two civic organizations. These written objections

referred to insufficient parking space, devaluation of adjacent property and dis approval of storefront churches.

A hearing was conducted by the Board of Appeals on June 8, 1965. At that hearing, William Richardson, 1049 East 72nd Street, Chicago, assistant pastor of the church, testified that religious services were conducted on Sunday from 11:15 A.M. to 2:00 P.M. and on Monday at 1:00 P.M. Regular meetings were held on Tuesday and Friday evenings. Willie Watson, 14 East Englewood, Chicago, secretary-treasurer and business manager of the church, testified that there were 60 seats in the church but that the congregation consisted of about 35 people and there had never been more than 45 persons in attendance at Sunday services. He also stated that the weekday meetings were attended by about two persons. He further testified that there were parking facilities for approximately 4 or 5 cars behind the church. When one of the members of the Board of Appeals stated that they had received many objections to the location of a storefront church in a business district because it would devalue the adjoining property, Watson stated that the church did not intend to devalue the neighborhood.

For the objectors, Allen Streeter, representing the Auburn Park Improvement Association, testified that the neighbors, merchants and his organization objected to a church being located in this business district because the parking facilities were inadequate and because storefront churches were detrimental to the community. Streeter also testified that there were many churches in the community but not in the vicinity of this property. Joe Jackson, who lived directly behind the church, testified that not more than two cars could park behind the building. Hezkiah Reed and Henry Dungy, who lived on the same block, both testified that parking facilities were crowded during Sunday services.

James Norris testified that he was a staff member of the Organization of Southwest Community and that this organization represented 150 affiliated groups in the com-

munity. He stated that on the day the church moved into the premises he inquired of the workers if they had permission from the city to use the premises as a church and was told that they had. After checking, he discovered that they did not have a permit and he then filed a complaint with the city building department. Norris also testified that his organization was opposed to churches in this business area because 79th Street was a traffic controlled street and the merchants in the busy shopping area near Halsted Street were already having much difficulty with parking facilities. He further testified that only two cars could be parked in the rear of the church.

The alderman of the ward within which the church property is located, James C. Murray, testified that he appeared in response to a large number of objections from residents in the neighborhood. While the neighbors were not opposed to churches, they were opposed to locating a church in a district composed of small businesses, near a furniture store and department stores already having parking problems. Based upon the objections of the property owners and community organizations, and based upon the fact that the church had failed to make a proper showing before the Board of Appeals, Alderman Murray requested that the application for a special use be denied. The Board of Appeals denied the application for the special use permit. This finding was affirmed by the Circuit Court on administrative review.

On administrative review, the court's function is limited to ascertaining if the findings and decision of the administrative agency are against the manifest weight of evidence. *DeGrazio* v. *Civil Service Commission of City of Chicago*, 31 Ill.2d 482, 202 N.E.2d 522 (1964). A reviewing court may examine the findings to determine if they are supported by the evidence. If there is competent evidence to support the findings, the decision will be affirmed. *Monroe* v. *City Service Commission of City of Waukegan*, 55 Ill. App.2d 354, 204 N.E.2d 486 (1965). The validity of a special use ordinance is well settled and the burden is on

the plaintiff to satisfy the standard it imposes. *Audino* v. *Board of Appeals of Chicago*, 75 Ill. App.2d 347, 221 N.E.2d 34 (1966).

We find that the decision of the Board of Appeals is amply supported by the evidence and that the congregation failed to establish that it was entitled to a special use under the zoning ordinance of the City of Chicago.

Plaintiff offered no evidence whatsoever as to the first requirement of the ordinance that "the special use is necessary for the public convenience at that location." While we recognize that the presence of a church brings benefits to any neighborhood, plaintiff failed completely to show that the church was necessary for the public convenience at its proposed site. There was no showing that this area had been assigned to the congregation for its ministry or that any members of the congregation even lived within the vicinity of the church. In fact, both of the church officers who testified for the congregation, lived in areas far from the proposed location of the church. Further, under the zoning ordinance, churches are permitted uses in certain districts, but plaintiff adduced no evidence of any effort having been made to locate the church in a permitted district rather than in a district where a special use was required. Plaintiff argues that the proposed premises are suited to the needs of the congregation, and that it is the convenience of the applicant to satisfy its needs which determines what is necessary for the public convenience. This argument not only overlooks that part of the ordinance which states "at that location", but also urges that public convenience means convenience of the applicant. This is not the law. *Illinois Bell Telephone Co.* v. *Fox*, 402 Ill. 617, 85 N.E.2d 43 (1949); *Rosenfeld* v. *Zoning Board of Appeals of Chicago*, 19 Ill. App.2d 447, 154 N.E.2d 323 (1958).

As to the requirement of the ordinance that the special use must be "so designed, located and proposed to be operated that the public health, safety and welfare will

be protected", the testimony of all the objectors was that the church caused traffic congestion and additional parking problems to a business district already plagued by inadequate parking facilities. We realize that traffic congestion during church services is always present no matter where a church might be located, but a municipality must consider traffic and parking as important factors in determining whether the public safety and welfare are protected through the grant of a special use.

Plaintiff failed to offer any evidence that the special use would not cause substantial injury to the value of other property in the neighborhood. When asked by one of the members of the Board about the concern of objectors that storefront churches located in business districts devalue property in the adjoining neighborhood, the secretary-treasurer of the church testified that the congregation did not intend to degrade the neighborhood. However, this statement of intent was not sufficient to meet the burden of proof required of an applicant in obtaining a special use. In view of the church's failure to present any such evidence and in view of the objections received, the Board was justified in finding that the grant of a special use would in fact cause substantial injury to the value of other property in the neighborhood.

The zoning ordinance also requires that the special use conform to the applicable regulations of the district. One such regulation was that the church must have one parking space for every 12 seats in the church. The evidence disclosed that the church had 60 seats and that average attendance at Sunday services was 35 persons. The witness for the congregation testified that there was parking space for 4 or 5 cars while two objectors testified that there was space for only two cars. Even if it could be argued that only 3 parking spaces were necessary because the congregation consisted of 35 persons, there was still a conflict in testimony as to the amount of parking available. Under such circumstances, the Board would have been justified in finding that the special use did not conform to the applicable regulations of the district.

Plaintiff congregation relies on *Columbus Park Congregation* v. *Board of Appeals*, 25 Ill.2d 65, 182 N.E.2d 722 (1962) wherein the Supreme Court reversed the decision of the Board of Appeals of Chicago and granted a special use to a congregation of Jehovah's Witnesses for a church in an area which was zoned B4-2. While there are many factual similarities, the *Columbus* case is distinguishable from the instant case in several important respects. There the congregation purchased the premises, then applied immediately for a special use prior to using the premises as a church. The Supreme Court found that it was improper to deny a special use upon speculative fears of traffic congestion, cautioning that the right of freedom of religion rises above property rights, inconvenience, annoyance or unrest. However, in the case at bar, immediately after purchase of the property, the congregation commenced using the premises as a church without seeking permission from the city. While we do not agree with the city's argument that such illegal use of the premises by the congregation of itself would have entitled the Board of Appeals to deny the permit, we do find that the testimony of the objectors regarding traffic congestion was not speculative. These witnesses were neighbors who were testifying as to what they had observed since the church had begun its operation. Further, in the *Columbus* case, the congregation was assigned that particular area in Chicago for its ministry and had been directed to serve the members living in the area in which they sought to establish their church. In the instant case, no evidence was presented of even minimal contact between the church and the neighborhood. The area was not assigned to the congregation, nor had the church ever been identified with the neighborhood. No evidence was presented that any of the congregation lived in the neighborhood. In the *Columbus* case, the congregation also had attempted to purchase other property in the same general area, but were unable to do so. In the case at bar, no evidence was presented that the congregation had attempted to acquire any other premises in that part of the neighborhood where a special use would not be necessary.

Similarly, in *Wolbach* v. *Zoning Board of Appeals of Chicago,* 82 Ill. App.2d 288, 226 N.E.2d 679 (1967) this court affirmed a special use grant for the construction of a synagogue in a district zoned B4-2. In that case the synagogue had been identified with the area for several years and in fact was located down the street from the proposed site. The synagogue was intended to serve its members living in that vicinity, and it was shown that the congregation had been unsuccessful in trying to find other suitable locations.

Plaintiff also contends that the decision should be reversed because the Board of Appeals failed to make a sufficient finding of fact in its order denying the application for a special use.

Plaintiff failed to raise this point in the trial court, and first raised it in this court in its reply brief. This court will consider only such questions as were raised and preserved in the trial court, and this principle likewise applies to a review of an administrative determination. *Leffler* v. *Browning,* 14 Ill.2d 225, 151 N.E.2d 342 (1958). *Des Plaines Currency Exchange, Inc.* v. *Knight,* 29 Ill.2d 244, 194 N.E.2d 89 (1963). Since the issue was not raised in the trial court, we do not consider it a proper subject for review.

Although mindful of the constitutional guarantee of freedom of religion and of the importance of houses of worship to any community, it is our opinion that the congregation failed to establish its right to a special use at the proposed location. Accordingly, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

LYONS, *J.,* concurs

BURKE, *P.J.*, dissenting:

The holding in *Columbus Park Congregation* v. *Board of Appeals,* 25 Ill. 2d 65, strongly supports the position of the plaintiffs in the case at bar. The undisputed testimony of Willie Watson and William Richardson, called by the plaintiffs, established the efforts of the congregation to find a suitable and convenient location and building for use as a church. The church purchased the property in February 1965 at a cost of $20,000 and thereupon commenced operation as a church. The building and grounds are suited to the needs of the congregation. There is ample room for the 35 members with room for expansion. The parking facilities meet the requirements of the ordinance. The Congregation of St. James Temple was founded in Chicago in 1945 and is a part of the parent church which has a national membership of 75,000 persons. The general health, safety and welfare of the community are not impaired by this church or its congregation. The community in fact benefits from its existence and location in the area.

The defendants, the Board of Appeals, and the trial court fail to recognize the applicability of the decision in *Columbus Park Congregation* v. *Board of Appeals,* 25 Ill. 2d 65, to the factual situation of the instant case. In *Columbus Park Congregation* the court said, page 72:

> "It is apparent that churches in any location will add to traffic and parking congestion during hours of worship. However, there is no evidence in the record before us to show any danger of a traffic or parking problem that would justify this particular use of the police power to limit the fundamental right of freedom of worship. (*Diocese of Rochester* v. *Planning Board,* 1 N.Y.2d 508, 136 N.E.2d 827; *Board of Zoning Appeals of Decatur* v. *Jehovah's Witnesses,* 233 Ind. 83, 117 N.E.2d 115, 120.) We, therefore, hold that to deny plaintiffs the right of worship at this location, upon the speculative fears of traffic congestion, bears no reasonable relation to the general health, safety and welfare."

The same court in addressing itself to the problem of detrimental effect of a church in a solid business block stated, page 73:

> "Such testimony ignores the fact that such business continuity would likewise be interrupted by a dance hall, crematory, mausoleum or trade school, all uses permitted in this B4 district. We are unable to see how the use as a church is more harmful to adjacent stores than the aforementioned permitted uses.
>
> "The arguments advanced by defendants, if followed, would be sufficient to bar all religious worship from the commercial areas of Chicago. Such arbitrary prohibition is not consonant with the constitutional guarantees of freedom of religion, nor do we believe it is consistent with the intent of the ordinance."

See also *Wolbach* v. *Zoning Bd. of Appeals of Chicago*, 82 Ill. App. 2d 288.

The litigation herein involves a changing neighborhood. The plaintiff church is a religious organization of excellent reputation and has been at this site for more than two years with a resulting salutary effect. It is an asset to the community and no one can say that it has been or is a detriment to the public health, safety and welfare of the community. The judgment should be reversed and the cause remanded with directions commanding the defendants to issue the special use permit allowing the plaintiffs to operate a church.

APPENDIX B

CHICAGO ZONING ORDINANCES

* * * * * * * *

Article I — Business Districts

8.3 Permitted Uses — Use and Bulk Regulations

The following uses of land or buildings are permitted in the districts indicated hereinafter under the conditions specified. With the exceptions of:

a. uses lawfully established on the effective date of this comprehensive amendment, or

b. special uses allowed in accordance with the provisions of Section 8.4.

* * * * * * * *

no building or tract of land shall be devoted to any use other than a use permitted hereinafter in the zoning district in which such building or tract of land shall be located.

* * * * * * * *

Preamble — B4-1 to B4-5 Restricted Service Districts.

The B4-1 to B4-5 General Service Districts are designed to furnish areas served typically by General Retail Districts with a wide variety of necessary services (and goods) incompatible with the uses allowed in such General Retail Districts and so not permitted therein.

* * * * * * * *

8. 3-4 Permitted Uses — B4-1 to B4-5 Restricted Service Districts

B. The following uses are permitted in the B4-1 to B4-5 Districts inclusive:

(1) Any use permitted in the B2-1 to B2-5 Districts inclusive—as set forth in Section 8.3-2B, unless otherwise set forth or superseded hereinafter. However, prior restrictions on ground floor location for

uses designated with an asterisk (*) shall not apply in the B4-1 to B4-5 Districts nor in any succeeding Business or Commercial Districts so specified.

Amusement establishments, bowling alleys, pool halls, dance halls, gymnasiums, swimming pools, and skating rinks.

(3) Auction Rooms.

(4) Auto Accessory Stores.

(5) Automobile Services Stations—for the retail sale and dispensing of fuel, lubricants, tires, batteries, accessories and supplies including installation and minor services customarily incidental thereto. Facilities for chassis and gear lubrication and for washing of not more than two vehicles are permitted only if enclosed in a building.

(6) Bicycle Sales, Rental, and Repair Stores.

(7) Blue-printing and Photostating Establishments.

(8) Caskets and Casket Supplies.

(9) Catering Establishments.

(10) Clothing and Costume Rental Shops.

(11) Crematories and Mausoleums.

(12) Dry Cleaning Establishments, employing not more than two persons in addition to one owner or manager.

(13) Employment Agencies.

(14) Exterminating Shops.

(15) Feed Stores.

(16) Fire Stations.

(17) Garages, for storage, repair and servicing of automobiles 1½ tons and under, but excluding body repair, painting and engine rebuilding. (Amend. 4-12-61, Coun. J. p. 4766)

(18) Greenhouses, Retail.

(19) Hotels and Motels.

(20) Ice Sales, Vending Machine.

(21) *Laboratories — Medical and Dental Research and testing.

(22) Launderettes, automatic, self-service only, employing not more than two persons in addition to one owner or manager, provided that laundry machines shall not exceed sixteen pounds capacity each. (Amend. 4-27-60, Coun. J. p. 2503).

(23) Laundries, employing not more than two persons in addition to one owner or manager.

(24) Meat markets, including the sale of meat and meat products to restaurants, hotels, clubs, and other similar establishments when conducted as part of retail business on the premises.

(25) Municipal or Privately-owned Recreation Buildings or Community Center.

(25a) Newspaper Distributors for Home Delivery and Retail Sale.
(Amend. 4-9-58. Coun. J. p. 7544).

(25b) Nursery schools, non-boarding, in a one-story building in B4-1 to B4-5 only. (Amend. 6-16-61 Coun. J. p. 5133)

(26) *Orthopedic and Medical Appliance Stores, but not including the assembly or manufacture of such articles.

(27) Parking Lots, open and other than accessory, for the storage of private passenger automobiles, and subject to the provisions of Section 8, 11.

(28) Pawn shops.

(29) Pet Shops.

(30) Police Stations.

(31) Plumbing Showrooms and Shops.

(31a) Printing establishments, employing not more than two persons in addition to one owner or manager. (Amend. 12-30-59 Coun. J. p. 1894).

(32) Public Libraries.

(33) Radio and Television Service and Repair shops.

(34) *Recording Studios.

(35) Restaurants and Taverns, including live entertainment and dancing.

(36) Schools, commercial or trade, when not involving any danger of fire or explosion nor of offensive noise, vibration, smoke, dust, odor, glare, heat, or other objectionable influences.

(37) Second-hand stores and Rummage Shops.

(38) Taxidermists.

(39) Telephone Exchanges — micro-wave relay towers, and telephone transmission equipment buildings.

(40) Theaters.

(41) Ticket Agencies, Amusement.

(42) Deleted. [Coun. J. 7-8-64, p. 2989.]

(43) Typewriter and Adding Machine Sales and Services.

(44) Umbrella Repair Shops.

(45) Undertaking Establishments, Funeral Parlors.

(46) Accessory Uses.

8.4 Special Uses — Use and Bulk Regulations.

The following uses may be allowed as special uses by the Board of Appeals in the districts indicated hereinafter in accordance with the provisions of Section 11.10. (Amend. 5-29-57 Coun. J. p. 5475).

8.4-1 Special Uses — B1-1 to B1-5 Local Retail Districts

• • • • • • • •

(2) Churches

. . . . . .

8.4-3 Special Uses — B3-1 to B3-5 General Retail Districts

(1) Any special use allowed in the B1-1 to B1-5 Districts, inclusive, (unless permitted under Section 8.3-3).

. . . . . .

8.11-1 Off-Street Parking — B1-1, B1-2, B2-1, B2-2, B3-1, B3-2, B4-1, B4-2, B5-1 and B5-1 Districts.

All parking spaces required to service buildings or uses shall be located on the same zoning lot as the building or use served, except as provided for as a Special use; in which case, buildings or uses may be served by parking facilities located on land other than the zoning lot on which the building or use served.

Parking spaces required on an employee basis shall be based on the maximum number of employees on duty or residing, or both, on the premises at one time. For the following uses, when allowed in any of the above districts, parking facilities shall be provided as indicated. Off-site parking spaces accessory to uses in a B District may be located in any B, C, or M District but may not be located in any R District, except as allowed in Section 7.4-1(4).

. . . . . .

(4) Church, School, College, and other Institutional Auditoriums. One parking space shall be provided for each 12 seats.

. . . . . .

Article 11 of the Chicago Zoning Ordinance provides the procedure to be followed in obtaining a special use permit, and the pertinent portions read as follows:

Variations in the Nature of Special Uses
(Herein called Special Uses)

11.10-1 Purpose. The development and execution of a comprehensive zoning ordinance is based upon the division

of the City into districts within which districts the use of land and buildings and the bulk and location of buildings and structures in relation to the land are substantially uniform. It is recognized, however, that there are variations in the nature of special uses which, because of their unique characteristics, cannot be properly classified in any particular district or districts, without consideration in each case, of the impact of those uses upon neighboring land and of the public need for the particular use at the particular location. Such variations in the nature of special uses fall into two categories:

(1) Uses either municipally operated, or operated by publicly regulated utilities or uses traditionally affected with a public interest; and

(2) Uses entirely private in character but of such an unusual nature that their operation may give rise to unique problems with respect to their impact upon neighboring property or public facilities.

11.10-2 Authorization. Variations in the nature of special uses may be authorized by the Zoning Board of Appeals provided that no application for variation in the nature of special use shall be acted upon by the Zoning Board of Appeals until after (1) a public hearing is noticed and held; and (2) a written report is prepared and filed with the Board by the Commissioner of City Planning, which report shall become a part of the record.

11.10-3 Application for variation in the nature of a Special Use. An application for a variation in the nature of a special use shall be filed and processed in the manner prescribed for applications for other variations and shall be in such form and accompanied by such information as shall be established from time to time by the Zoning Board of Appeals.

11.10-4 Standards. No special use shall be granted by the Zoning Board of Appeals unless the special use:

(1) a. Is necessary for the public convenience at that location;

b. Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected; and

(2) Will not cause substantial injury to the value of other property in the neighborhood in which it is located; and

(3) It is within the provisions of "Special Uses" as set forth in rectangular boxes appearing in Articles 7, 8, 9 and 10; and

(4) Such special use shall conform to the applicable regulations of the district in which it is to be located.

11.10-5 Conditions. The Commissioner of City Planning may recommend and the Board of Zoning Appeals may provide such conditions or restrictions upon the construction, location and operation of a special use, including but not limited to provisions for off-street parking and loading, as shall be deemed necessary to secure the general objectives of this comprehensive amendment and to reduce injury to the value of property in the neighborhood.

SUPREME COURT, U. S.

MAY 26 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1326

ST. JAMES TEMPLE OF THE A. O. H. CHURCH OF GOD, INC., A RELIGIOUS CORPORATION, ET AL.,
Petitioners,

vs.

BOARD OF APPEALS OF THE CITY OF CHICAGO, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

RESPONDENTS' BRIEF IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

INDEX.

	PAGE
Question Presented	1
Statement of Facts	1
Reasons for Denying the Writ	4
There is no discrimination against the establishment of churches in the City of Chicago	4
Conclusion	9

CITATIONS.

Cases.

Audino v. Board of Appeals of Chicago, 75 Ill. App. 2d 347, 221 N. E. 2d 34 (1966)	6
Columbus Park Congr. of Jehovah's Witnesses, Inc. v. Board of Appeals, 25 Ill. 2d 65, 182 N. E. 2d 722 (1962)	9
O'Brien v. City of Chicago, 347 Ill. App. 45, 105 N. E. 2d 917 (1952)	7, 8

Ordinance.

Chicago Zoning Ordinance, secs. 11.10-2, 11.10-4	5

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ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

RESPONDENTS' BRIEF IN OPPOSITION.

QUESTION PRESENTED.

Whether the City of Chicago discriminates against the establishment of churches.

STATEMENT OF FACTS.

The Petition for Writ of Certiorari includes gratuitous statements which do not appear in the record and omits facts which are needed for a fair understanding of this case.

The petition recites that prior to the location of the church in its present site it was located "in an all-Negro neighborhood" (Petition, p. 3). The only reference in the record regarding the prior location of the church appeared in the petitioners' Complaint in Administrative Review filed in the Circuit Court of Cook County, Illinois, which alleged that the church was founded and located at 3028 S. Michigan Avenue, Chicago, Illinois, then moved to 3158 S. Michigan Avenue, Chicago, Illinois, and ultimately removed to its present location at 856 W. 79th Street, Chicago, Illinois (A. 3, R. 5). There was no reference to the racial character of these locations.

Also under the heading "Statement of Facts," the petition recites that the petitioners "working within the limits of its budget" sought to establish a church in the area which was "beginning to show the strains of racial transition from Caucasian to Negro". (Petition, p. 4). Again, it should be noted that the record is devoid of any reference to whether the petitioners were or were not "working within the limits of its budget" nor is there even a scintilla of evidence that "the area was beginning to show the strains of racial transition from Caucasion to Negro."

The petition also states as a fact that "strong opposition to a Negro storefront church appeared". (Petition, p. 4). Strong opposition to the storefront church was expressed by residents of the neighborhood, who for the most part were Negroes, but the opposition, both in testimony and letters to the Board of Appeals, was directed against the storefront church *per se* and not its racial make-up (A. 16-19, 24-30; R. 35-40, 63-85).

After the Circuit Court of Cook County, Illinois, on administrative review, affirmed the action of the Board of Appeals in denying a special use for the storefront church, the petitioners filed an appeal directly to the Supreme Court of Illinois (*St. James Temple, etc.* v. *The*

Board of Appeals, et al., No. 40077). On March 28, 1967, the Supreme Court of Illinois transferred the appeal to the Appellate Court of Illinois, First District. The transfer order recited, *inter alia:*

> "Although plaintiff claims that there is a question of freedom of religion presented, we find no substantial question of that nature in the record. The case involves only the usual factors present in every zoning case and we have no jurisdiction on direct appeal."

After the Appellate Court of Illinois affirmed the denial of the special use, the church petitioned for leave to appeal to the Supreme Court of Illinois and the petition was denied.

REASONS FOR DENYING THE WRIT.

For the following reasons, a writ of certiorari should not issue to review the decision of the Appellate Court of Illinois, First District.

THERE IS NO DISCRIMINATION AGAINST THE ESTABLISHMENT OF CHURCHES IN THE CITY OF CHICAGO.

Under the provisions of the Zoning Ordinance of the City of Chicago churches are permitted uses in all areas in the city zoned R1 through R8, which includes every residence district. In various other classifications, including B4-2, Restricted Service District, a church may be established if an application for a special use is filed and approved by the Zoning Board of Appeals. This zoning legislation is consistent with the modern theory of zoning. It controls intensity of use, or, expressed differently, prevents extremes in density of people throughout the urban centers. In addition, it seeks to establish a pattern of types of uses so that a factory, for example, is precluded from being established in the midst of a residential area. It prevents uses which are incompatible with the character and development of permitted uses in the area and it protects the public welfare and health by limiting congestion in the public streets. The record discloses that the petitioner church had two locations prior to the one now at issue and both were in areas zoned general residential, under which churches are permitted uses (A. 3, R. 5). The petitioners then established and operated the church at 856 W. 79th Street, Chicago, Illinois (A. 3, R. 5). This was a B4-2, Restricted Service District, where a special use permit was required.

Mr. Jim Norris testified at the hearing before the Board of Appeals of the City of Chicago that he inquired of the petitioners whether they had a permit to conduct a church at the location and was told they had a permit. He then checked and found that the church did not have a permit and therefore filed a complaint with the Building Department. The witness stated that traffic and parking was a problem on 79th Street (A. 28, R. 80-81).

Thereafter, the petitioners filed an application for a special use under the provisions of the ordinance (Chicago Zoning Ordinance, sec. 11.10-2). The Chicago Zoning Ordinance, sec. 11.10-4 establishes the required standards to be met for the issuance of a special use, as follows:

> "No special use shall be granted by the Zoning Board of Appeals unless the special use:
>
> (1) a. Is necessary for the public convenience at that location;
>
> b. Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected; and
>
> (2) Will not cause substantial injury to the value of other property in the neighborhood in which it is to be located; and
>
> (3) It is within the provisions of 'Special Uses' as set forth in rectangular boxes appearing in Articles 7, 8, 9 and 10; and
>
> (4) Such special use shall conform to the applicable regulations of the district in which it is to be located."

After a hearing (A. 15-31, R. 35-87) the Board of Appeals denied the application for a special use on a finding that no facts were presented which justified approval of the application (A. 5-6, R. 8). On Administrative Review the Circuit Court of Cook County affirmed the de-

nial of the special use and found it was not against the manifest weight of the evidence heard by the board nor contrary to the requirements of the ordinances or statutes (A. 32, R. 96).

In *Audino* v. *Board of Appeals of Chicago*, 75 Ill. App. 2d 347 (1966 Abst. Op.), the court stated (slip opinion):

> "The validity of a 'special use' ordinance is well established and the burden is on plaintiff to satisfy the standards it imposes. *International Harvester Co.* v. *Zoning Board*, 43 Ill. App. 2d 440, 193 N. E. 2d 856 (1963); *Kosoglad* v. *Zoning Board of Appeals of Chicago*, 47 Ill. App. 2d 216, 198 N. E. 2d 216 (1964); *Kotrich* v. *The County of DuPage*, 19 Ill. 2d 181, 166 N. E. 2d 601 (1960)."

At the hearing, the petitioners failed to sustain the burden of establishing that they had met the standards required by the ordinance for the issuance of a special use permit. They did not show that the church at the location they chose was necessary for the public convenience. The most they established was that it suited their convenience, and even this is questionable, since nothing in the record even suggests that the members of the church lived in the area. "Their convenience" could not be equated to mean "public convenience" as expressed in the ordinance.

A succession of witnesses opposed to the granting of the special use testified, and a number of individuals and organizations sent the board letters likewise expressing opposition. For example, Hezkiah Reed, Henry Dungy, Joe Jackson and Osceola Saffold, who all lived on south Peoria Street immediately adjacent to the church, objected to the church location because it caused a traffic and parking problem and a resultant hazard to children playing in the vicinity (A. 26-28, R. 71-78).

Churches are permitted in all of the areas of the city classified for residential use, no special use or other special

permit is required to establish a church in any of these residential areas. The petitioners did not endeavor to obtain property in the large residential areas surrounding 79th Street for the establishment of their church. They merely opened a church on 79th Street and then sought to obtain the requisite permission only after the neighbors objected to their actions.

Thus, the record reveals that not only did the petitioners fail to sustain the burden of showing that the required standards were met, but, in addition, the record discloses facts that militated against the issuance of a special use. In the face of this record, the petitioners have made an unsupported calumnious accusation that "the Illinois courts have sanctioned a plan to prevent the establishment of a Negro church in a racially changing neighborhood by construing a Chicago Zoning Ordinance in an unconstitutional manner" (Petition, p. 4). The references to "a Negro church" and "a racially changing neighborhood" are entirely gratuitous observations by the petitioners; there is nothing in the record to sustain these statements.

The petitioners cite *O'Brien* v. *City of Chicago,* 347 Ill. App. 45, 105 N. E. 2d 917 (1952), in support of their contention that the government could not exercise the police power to prevent a church in a particular locale of the city (Petition, p. 5). However, they only set out a small segment of the decision, whereas the facts in the *O'Brien* case plus a more complete citation of the court's language demonstrates that, in fact, the decision is inapposite to the instant petitioners' contention.

O'Brien v. *City of Chicago, et al.,* 347 Ill. App. 45, was an appeal from a declaratory judgment which held invalid the approval by the City Council of Chicago of a plat of subdivision establishing a church on the corner of 93rd and Pleasant Avenue, Chicago. The plaintiff owned and resided on property adjoining the site and sought to prevent

construction of the church. On appeal the court held that the church could be constructed. Preceding the language cited in the instant petition, the Illinois reviewing court stated (p. 51):

> "The ordinance as we have interpreted it, imposes a condition with respect to the site on which a church may be erected. There is no question of the city's right to exercise its police power in this fashion provided the conditions are reasonably related to the public health, morals, comfort, safety or welfare. See *City of Sherman* v. *Simms*, 143 Tex. 115, 183 S. W. (2) 415; *Pentecostal Holiness Church of Montgomery* v. *Dunn*, 248 Ala. 314."

The excerpt from the *O'Brien* case recited in the instant petition states that courts will not allow prohibitions against the erection of a church *in any area*, whereas in the case at bar the ordinances of the City of Chicago provided that churches could be maintained in any residential district. Immediately following the quotation from *O'Brien* cited by the petitioners, the court continued (pp. 51-52):

> "[T]ext writers support the view which courts generally have taken. In Bassett on Zoning (1936), p. 200, the author says:
>
> > 'Practically all zoning ordinances allow churches in all residential districts. It would be unreasonable to force them into business districts where there is noise and where land values are high * * *.'
>
> "Yokely, Zoning Law & Practice (1948), sec. 183, p. 367, says:
>
> > 'Since the advent of zoning, churches have been held proper in residence districts. Both the early decisions and the recent ones frown on the exclusion of churches from residence districts * * *.'"

The Court in *O'Brien* then continued (p. 53):

> "[W]e do not believe it is a proper function of government to interfere in the name of the public to exclude

churches from residential districts for the purpose of securing to adjacent landowners the benefits of exclusive residential restrictions."

The City of Chicago follows the rule suggested in the *O'Brien* decision by specifically allowing churches in all residential areas.

The petitioners allege that the instant case is in conflict with *Columbus Park Congr. of Jehovah's Witnesses, Inc.* v. *Board of Appeals,* 25 Ill. 2d 65, 182 N. E. 2d 722 (1962). The Appellate Court of Illinois, First District, carefully distinguished that decision from the instant case (Petition, p. 6a).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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